86-467

Supreme Court, U.S.
FILED
SEP 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

No.

In the Supreme Court of the United States

October Term, 1986

CARL E. LANGLEY, WILBUR E. BOND,

Petitioners,

v.

JOHN B. YOUNG,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Bernard N. Portnoy, Esq.
WILSON, PORTNOY, LEADER,
PIDGEON & ROTH, P.C.
2800 N. Woodward, Ste. 200
Bloomfield Hills, MI 48013
(313) 332-9256

September 15, 1986

RENAISSANCE PRINTING, INC., 1133 GRISWOLD
DETROIT, MICHIGAN 48226 (313) 964-3185

QUESTIONS PRESENTED FOR REVIEW

1. DOES THE FAILURE TO PURSUE POST-TRIAL MOTIONS PRECLUDE APPELLATE REVIEW OF A JURY VERDICT WHEN NO EVIDENCE HAS BEEN PRESENTED ON AN ESSENTIAL ELEMENT OF PLAINTIFF'S CLAIM?
2. DOES THE *DE NOVO* REVIEW INCUMBENT UPON APPELLATE COURTS IN LIBEL/SLANDER ACTIONS OBVIATE THE NECESSITY OF POST-TRIAL MOTIONS?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioners, Carl Langley and Wilbur Bond, respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered in this cause on June 24, 1986.

OPINIONS BELOW

The Opinion of the Court of Appeals reported at 793 F.2d 792 is set forth in Appendix, *infra*, p. 1a. Also appearing in the Appendix are the following:

1. Oral argument of counsel on the Defendants' Motion for a Directed Verdict at the close of Plaintiff's proofs, and the Court's Decision on the same drawn from the Transcript, appearing at Appendix, *infra*, p. 7a.

2. The Judgment of the District Court on the Jury Verdict entered January 29, 1985, appearing at Appendix, *infra*, p. 14a.

JURISDICTION

The Judgment of the Court of Appeals for the Sixth Circuit was entered on June 24, 1986. This Petition for a Writ of Certiorari is filed within 90 days of that date; and the jurisdiction of the Supreme Court of the United States is envoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const, Amendment I.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const, Amendment XIV, Section 1.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. §1983.

STATEMENT OF CASE

This is an appeal from the decision of the United States Court of Appeals for the 6th Circuit in the case of *Young* v *Langley*, 793 F.2d 792 (6th Cir. 1986).

The Defendants, Langley and Bond, were the Sheriff and Under-Sheriff, respectively, of Lapeer County, Michigan

from 1976 through 1980. The Plaintiff was a Deputy Sheriff, and in the Spring of 1980 decided to run for Sheriff himself.

Subsequent to filing his nominating petitions, the Plaintiff alleged that certain disciplinary action was taken against him in retaliation for his candidacy, which discipline he claims was premised upon false claims of improper action on his part as a Deputy, which claims in turn were communicated to the local newspaper. The sole proof of any damages suffered as a result of the activities alleged to have been committed by the Defendants was that the Plaintiff's candidacy started "really slipping bad" and that his daughter "was kind of upset about it because of the fact that the kids knew who her father was." (T.T.Vol.II, pp. 53–54).

With regard to the continuation of his candidacy, the Plaintiff acknowledged that it would have been improper for him to campaign on duty, and no proof was presented during the trial to indicate that he was prevented from exercising his First Amendment rights to campaign for office.

The false charges allegedly communicated to the newspaper, which communication was the gravamen of the Plaintiff's claim for damages, were three-fold: (1) that the Defendants falsely charged the Plaintiff with failing to respond to an emergency dispatch; (2) that the Defendants falsely charged the Plaintiff with conduct unbecoming an officer and leaving work early for a school visit with his daughter; and (3) that the Defendants falsely charged and suspended the Plaintiff for allowing a jailbreak to occur.

Testimony during trial demonstrated that the charge of leaving work early and failing to respond to an emergency dispatch were charges levied by the Plaintiff's supervising Sergeant, Sgt. Arthur White, not the Defendants. (T.T.Vol.IV, pp. 57, 63).

Plaintiff's expert witness, Lloyd Fayling, a Lieutenant with the Michigan State Troopers, testified that the failure of the

Plaintiff to respond to the emergency dispatch as he did would have constituted improper action on his part, and should have subjected him to discipline. (T.T.Vol.IV, pp. 15-17).

The charge of leaving work early, levied by his Supervisor, Sgt. White, was later dismissed after investigation by Under-Sheriff Bond, but not until after the article that appeared in the Lapeer County Press had been published (T.T.Vol.V, pp. 33-34).

With regard to the charge of conduct unbecoming an officer, Defendant Langley sent two detectives to investigate the incident, and interview the participants and witnesses to the event. In levying the charge of conduct unbecoming an officer, Sheriff Langley relied upon the reports submitted to him by those detectives, which the Plaintiff himself acknowledged was appropriate procedure (T.T. Vol. V, pp. 28-29), as did the current County Sheriff called as one of the Plaintiff's witnesses. (T.T. Vol. III, p.16). Based upon the reports submitted to Sheriff Langley by his detectives, the current Sheriff, Ronald Kalanquin, testified that the Plaintiff's actions, as described in those reports, was inappropriate, but he would not place that charge within the realm of a serious offense. (T.T. Vol. III, pp. 17-18).

Finally, with regard to charging the Plaintiff with responsibility for allowing a jailbreak to occur, Under-Sheriff Bond was present to hear another member of the Sheriff's Department direct Plaintiff Young to watch prisoners while the second employee was temporarily away from the area where the prisoners were being held. (T.T. Vol. V, p. 119).

Nowhere during the course of the Plaintiff's case in chief, nor in fact during the entirety of the trial, was there any evidence presented to demonstrate that the charges, allegedly made by the Defendants and communicated to the newspaper, were known to be false when communicated. The entirety of the Plaintiff's claim for damages was premised upon

the publication of the charges recited above in the local newspaper.

At the close of Plaintiff's proofs, a Motion for Directed Verdict was made on behalf of the Defendants and denied. No Motion for a New Trial nor a Judgment NOV was made at the conclusion of the trial which ended with an award of $750,000.00 in favor of the Plaintiff and against the Defendants, $400,000.00 of which constituted punitive damages.

Although the 6th Circuit Court of Appeals entitled the issue "sufficiency of the evidence," *Young* v *Langley*, *supra*, at 794, the real issue presented is whether or not there was any evidence of "actual malice" that is, whether there was any evidence at all to demonstrate that the Defendants knew that the statements attributed to them were false when made.

The decision of the 6th Circuit Court of Appeals in refusing to review this case to determine whether or not there was any evidence as to "actual malice" is in conflict with Opinions of other Circuits, and conflicts with a recent Opinion of the Supreme Court of the United States on the review that should be afforded to actions involving libel/slander.

REASONS FOR GRANTING THE WRIT

I

THE FAILURE TO PURSUE POST-TRIAL MOTIONS DOES NOT PRECLUDE APPELLATE REVIEW OF A JURY VERDICT WHEN NO EVIDENCE HAS BEEN PRESENTED ON AN ESSENTIAL ELEMENT OF PLAINTIFF'S CLAIM.

In ruling that the Appellants in this case, Langley and Bond, failed to preserve for review what it phrased as an issue

involving the "sufficiency of the evidence" the Sixth Circuit Court of Appeals stated:

> "Strictly speaking, this Court does not review the actions of juries. Our review of the sufficiency of the evidence is by review of a trial Judge's ruling on Motions for Directed Verdict or JNOV." *Young* v *Langley*, 793 F.2d 794 (6th Cir. 1986).

In its ruling, the Court found that the Defendants waived its original Motion for Directed Verdict by failing to renew that Motion at the close of the entire testimony. That particular ruling is in direct conflict with Opinions from other Circuits.

It should be noted that although the Court of Appeals entitled a portion of its Opinion as "sufficiency of the evidence," what was challenged on appeal was the absence of any evidence on a crucial element of the Plaintiff's claim. As evidenced below, other Circuits have deemed appropriate for appellate review cases involving circumstances of this nature, and that conflict among Circuits presents this case as one appropriate for review by this Court.

The case of *Morgan Electric Co.* v *Neill*, 198 F.2d 119 (9th Cir. 1952), for instance, stands precisely for a proposition directly contrary to that decided by the 6th Circuit in the instant case.

In that case, the trial Court had stricken certain of Defendants' defenses, to which objection was made. In its post-trial Motions upon the Plaintiff's verdict, the Defendant did not raise the issue of whether or not a new trial should be granted upon the trial Court's decision to strike those defenses. On Appeal, the Plaintiff-Appellee asserted that the failure to raise the earlier objections to the Court's rulings by way of its Motion for a New Trial constituted a waiver of those objections.

The Ninth Circuit disagreed. In so ruling, the Ninth Circuit stated:

> "On a Motion for New Trial the losing party should not be compelled (as the price of maintaining his objections Court rulings on a later Appeal) to again present all his previous objections to Motions to Strike his pleadings. The previous Orders of the Court, if legally objectionable, may be reviewed on Appeal if properly presented. They are covered in Appellant's specification of errors and in its points to be relied upon on Appeal. The rulings complained of deprived Appellant of an important element in its defense and this deprivation is reviewable in this Court." *Morgan Electric Co.*, *supra*, 198 F.2d 119, 122.

In the instant litigation, a Motion for Directed Verdict was made at the close of Plaintiff's proofs premised upon the absence of any evidence whatsoever on one of the crucial elements of Plaintiff's case. That Motion was denied by the trial Court. Although the Motion was not renewed at the close of the trial, based upon the Ninth Circuit's ruling in *Morgan Electric Co.* v *Neill*, *supra*, such does not preclude review by an appellate court.

In *Franki Foundation Co.* v *Alger-Rau & Associates, Inc.*, 513 F.2d 581 (3rd Cir. 1975) a verdict in excess of $24,000.00 was rendered in favor of the Plaintiff against the Defendant. Subsequently, counsel for the Defendant filed a Motion of New Trial and Judgment NOV. After that filing, counsel for the Defendant filed a Motion to withdraw his appearance alleging that his client had expressed dissatisfaction with his services and refused to pay a portion of an outstanding bill for services. The Defendant secured a new counsel who in turn wrote a letter to the Court requesting that the Court consider the post-trial Motions on the basis of the written documentation that had already been presented. Due to the fact that counsel for the Defendant failed to appear or to present a brief to the

Court or to otherwise prosecute a Motion for a New Trial or a Judgment NOV, the District Court denied those Motions.

On appeal, the Plaintiff alleged that the failure to prosecute the post-trial Motions constituted a waiver of that appeal through abandonment.

In reversing, the Third Circuit ruled:

> "Appellee's contention that Appellant has waived its right to appeal through abandonment pre-supposes the prosecution of post-trial Motions to be a pre-requisite to an appeal. While appellate courts have favored the use of post-trial motions to assure the efficient operation of the judicial process and to provide 'the District Court an opportunity to assist [reviewing Courts] by furnishing its views, if it has something relevant to contribute,'' *Welch & Corr Construction Corp.* v *Wheeler*, *supra*, at 141, of 470 F.2d. *The right to appeal is not conditioned upon the filing and prosecution of post-trial motions.* In fact, there are many instances in which the filing of such motions would be an unnecessary and/or futile task.'' *Franki Foundation Co.*, *supra*, 587. (Emphasis added).

As addressed below, the filing of such motions in the instant litigation was an unnecessary task due to the necessity of a De Novo review by the Appellate Court in cases of this nature.

In *Sherrill* v *Royal Industries, Inc.*, 526 F.2d 507 (8th Cir. 1975), certain objections were posed to the trial Court's jury instructions which were not re-asserted in the Defendant's Motion for a New Trial. Although set forth only by way of a footnote to its Opinion, apparently in response to one of the contentions made by the Appellee in his Brief, nonetheless the 8th Circuit ruled:

> "Appellees contend that appellant has waived the right to appeal a number of the issues raised herein. They assert that appellant did not renew some of his objections

to the Court's instructions in his Motion for a New Trial and thereby is barred from having those objections considered here. This argument is without merit. *A Motion for a new trial under F.R. Civ. P. 59 is not a pre-requisite to appeal. J. Moore, Federal Practice*, ¶59.04[11](1974). Furthermore, virtually every issue raised on this appeal was the subject of an objection which was renewed in the Motion of a New Trial." *Sherrill, supra*, 509. (Emphasis added).

Finally, the case of *Colletti* v *Credit Bureau Services, Inc.*, 644 F.2d 1148 (5th Cir. 1981) deserves examination. In that case, neither a Motion for a Directed Verdict nor a Judgment NOV was made at the District Court level. In its determination as to whether or not the case was one properly before an appellate court for review, the 5th Circuit ruled:

"Before discussing the merits of Appellant's contention about the verdict, we note that Appellant did not move for either a directed verdict or a judgment nov in the District Court. Therefore, this Court cannot review the sufficiency of the evidence supporting the jury's verdict. *Dunn* v *Sears, Roebuck & Co.*, 639 F.2d 1171, 1175 (5th Cir. 1981); *Coughlin* v *Capital Cement Co.*, 571 F.2d 29, 297 (5th Cir. 1978). This Court's inquiry is 'limited to whether there was *any* evidence to support the jury's verdict, irrespective of its sufficiency, or whether plain error was committed, which, if not noticed, would result in a manifest miscarriage of justice.'" *Colletti, supra*, 1151.

Thus, there exists a conflict among the Circuit Courts of Appeals as to whether or not a post-trial motion for a new trial is necessary to preseve for review on appeal certain issues previously raised. As set forth below, a De Novo review is necessary in cases of this nature, and to require the filing a post-trial motions in such a case would be an unnecessary task. A Motion for Directed Verdict was made at the close of Plaintiff's proofs and no evidence was presented subsequent

to that Motion that could be deemed to have cured the absence of any proof whatsoever on a crucial element of the Plaintiff's claim.

The crucial element missing in Plaintiff's case during the course of trial was the fact that the statements attributed to the Defendants, alleged to be defamatory, were never shown in any manner to have been made with "actual malice," that is, made with knowledge of their falsity.

II

THE *DE NOVO* REVIEW INCUMBENT UPON APPELLATE COURTS IN LIBEL/ SLANDER ACTIONS OBVIATES THE NECESSITY OF POST-TRIAL MOTIONS.

In this Court's opinion in *Bose Corp.* v *Consumers Union of U.S. Inc.*, 466 U.S. 485, 80 L.Ed.2d, 502, 104 S.Ct. 1949 (1984) this Court addressed both the burden of proof necessary to sustain a verdict in a defamation action, and the nature of the review to which the evidence presented must be subjected by an appellate court. In this Court's ruling, not only was it determined that a De Novo review of that evidence must be had by the appellate court, but in cases involving defamation, the record must establish actual malice with "convincing clarity." 466 U.S. 485, 514, 80 L.Ed.2d 502, 526, 104 S.Ct. 1949, 1967.

During the period of time when statements allegedly made by the Defendants-Appellants were made, the Plaintiff, Mr. Young, was a candidate for public office. As a candidate, he was a "public figure" within the meaning of the law of defamation. He had obtained his nominating petition some time in February, 1980 (T.T.Vol. I — p. 50), and had filed those petitions some time prior to the filing deadline in May of 1980. (T.T.Vol. II — p. 52).

Under the dictates of *New York Times* v *Sullivan*, 376 U.S. 254, 11 L.Ed.2d 686, 84 S.Ct. 710 (1964), the First Amendment precludes recovery by a public figure in defamation cases unless the Plaintiff proves by clear and convincing evidence that the Defendant made false, disparaging statements with "actual malice."

This Court recently had an opportunity to apply the rule of law announced in *New York Times* v *Sullivan*, *supra*, in a defamation case involving the alleged disparagement of a product. That case, as noted above, *Bose Corp.* v *Consumers Union of U.S., Inc.*, *supra*, addressed the *burden of proof* necessary to sustain a verdict in a defamation action. In fact, this Court described the particular issue before it by stating:

> "We granted Certiorari to consider whether the Court of Appeals erred when it refused to apply the clearly erroneous standard of Rule 52(A) to the District Court's "finding" of actual malice. 461 U.S. 904, 76 L.Ed.2d 805, 103 S.Ct. 1872 (1983)." *Bose Corp.*, *supra*, at 493, 80 L.Ed.2d 511, 512, 104 S.Ct. 1955.

This Court decided that the Court of Appeals did not err in so refusing. The *Bose Corp* suit arose out of an article published in the May, 1970 issue of the Defendant's magazine, "Consumer Reports." Among the various allegedly disparaging statements made in the article about the Bose stereo system was included the following:

> "Worse, individual instruments heard through the Bose system seem to grow to gigantic proportions and tend to wander about the room. For instance, a violin appeared to be 10 feet wide and a piano stretched from wall-to-wall. With orchestral music, such effects seemed inconsequential. But we think they might become annoying when listening to a soloist." *Bose*, *supra*, at 488, 80 L.Ed. 2d 508,509, 104 S.Ct. 1953.

After first acknowledging that Rule 52(A) normally precludes setting aside the findings of fact unless those findings are clearly erroneous, the Court indicated that its review must be faithful to both Rule 52(A) and the *New York Times* rule requiring independent review of the entirety of the evidence presented during the course of trial in defamation actions.

Quoting at length from this Court's own Opinion in *Time, Inc.* v *Pape*, 401 U.S. 279, 28 L.Ed.2d 45, 91 S.Ct. 710 (1971), this Court opined in *Bose*, *supra*:

> "'In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will re-examine the evidentiary basis on which those conclusions were founded,' noting that 'in cases involving the area of tension between the First and Fourteenth Amendments on the one hand and State defamation laws on the other, we have frequently had occasion to review the evidence in the . . . record to determine whether it could constitutionally support a judgment for the plaintiff.'" *Bose*, *supra*, 466 U.S. 509,510, 80 L.Ed.2d 423, 104 S.Ct. 1964,1965.

This Court went on to set forth the standard of review that should be applied by appellate courts in defamation cases. In so ruling, this Court stated:

> "The requirement of independent appellate review reiterated in *New York Times* v *Sullivan* is a rule of Federal Constitutional Law. It emerged from concrete cases; it is law in its purest form under our common law heritage. It reflects a deep held conviction that Judges — and particularly members of this Court — must exercise such review in order to preserve the precious liberty established and ordained by the Constitution. The question of whether the evidence in the record in a defamation case is of convincing clarity required to strip the utterance of First

> Amendment protection is not really a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold *that bars the entry of any judgment that is not supported by clear and convincing of "actual malice."* *Bose*, *supra*, 466 U.S. 510,511, 80 L.Ed.2d 523, 104 S.Ct. 1965.

In reviewing the testimony during the trial of the *Bose* case, *supra*, much ado was made about the testimony of the reporter for "Consumers Reports," Seligson, who wrote in his article that the Bose sound system tended to wander "about the room." After noting that Mr. Seligson's testimony did not rebut any inference of actual malice that the record otherwise would have supported, it was clear that his questionable testimony "did not constitute clear and convincing evidence of actual malice." 80 L.Ed.2d 524.

After noting that the trial court found it impossible to believe Mr. Seligson's attempt to equate the word "about" with "across," this Court stated:

> "Seligson displayed a capacity for rationalization. He had made a mistake and when confronted with it, he refused to admit it and steadfastly attempted to maintain that no mistake had been made — that the inaccurate was accurate. That attempt failed, but the fact that he made the attempt does not establish that he realized the inaccuracy at the time of publication." 466 U.S. 512, 80 L.Ed.2d 524, 104 S.Ct. 1966.

In the instant case, no evidence whatsoever was presented to demonstrate that any of the statements attributed to the Defendants-Appellants were made with actual malice. Testimony was presented which allegedly supported an ill motive on the part of the Defendants-Appellants in taking action against Plaintiff Young, but no evidence was presented to demonstrate that either of the Defendants-Appellants knew the statements they allegedly made, when made, were false.

In such cases as this, this Court ruled in *Bose*, *supra*, a specific standard of review was required. This Court ruled:

> "We reaffirm the principle of independent appellate review that we have applied uncounted times before. We hold the clearly erroneous standard of Rule 52(A) of the Federal Rules of Civil Procedures does not prescribe the standard of review to be applied in reviewing a determination of actual malice in a case governed by *New York Times* v *Sullivan*. Appellate Judges in such a case must exercise independent judgment and determine *whether the record establishes actual malice with convincing clarity*." 80 L.Ed.2d 525,526.

In a footnote to the Opinion, this Court set forth the burden a Plaintiff must carry to establish actual malice with convincing clarity. Therein it was stated:

> "The burden of proving actual malice requires the Plaintiff to demonstrate with *clear and convincing evidence* that the Defendant realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement." *Bose*, *supra*, 466 U.S. 511, 80 L.Ed.2d 524, 104 S.Ct. 1965.

In the instant litigation, no proof of any kind was submitted that either of the Defendants-Appellants knew that any statement attributed to them was false, nor was there any evidence whatsoever as to the subjective opinion either of them entertained with regard to the accuracy of the statements attributed to them. Without that clear and convincing evidence, the jury's verdict in this litigation cannot stand and must be overturned.

CONCLUSION

For the reason stated herein, a Writ of Certiorari should issue to review the decision of the United States Court of Appeals for the Sixth Circuit in this cause.

Respectfully submitted,

WILSON, PORTNOY, LEADER,
PIDGEON & ROTH, P.C.

BY: /s/ JAMES M. PIDGEON

JAMES M. PIDGEON
Attorneys for Petitioners
2800 N. Woodward/Ste. 200
Bloomfield Hls., MI 48013
(313) 332-9256

Dated: September 15, 1986

APPENDIX

No. 85-1196

United States Court of Appeals
For The Sixth Circuit

JOHN B. YOUNG,
Plaintiff-Appellee,

v.

CARL E. LANGLEY; WILBUR E. BOND, Jointly and Severally,
Defendants-Appellants.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed June 24, 1986

Before: KEITH and MARTIN, Circuit Judges; and WEICK, Senior Circuit Judge.

KEITH, Circuit Judge. Defendants, Carl E. Langley and Wilbur Bond, appeal the jury verdict for plaintiff, John B. Young, under 42 U.S.C. § 1983 (1982) for job discrimination. We affirm the jury verdict because defendants did not preserve their issues on appeal.

I.

The defendants, Langley and Bond, were Sheriff and Under Sheriff of Lapeer County Michigan from 1976 thru 1980. Plaintiff was a Deputy Sheriff. In the Spring of 1980, plaintiff decided to run for the office of Sheriff. After plaintiff circulated nominating petitions to run for Sheriff, defendants demoted plaintiff to turnkey status allegedly because he took his daughter from school early in violation of a city ordinance and he did not respond to an emergency call. Two months later on June 3, 1980, plaintiff was suspended for five days

without pay for allegedly allowing a prisoner to escape. Defendants then relayed all of these charges to the Lapeer County Press, which were printed in a June 4, 1980 newspaper article. Plaintiff denied the above charges and claimed that his first and fourteenth amendment rights were violated when defendants punished plaintiff for wrongs he did not commit and told the Lapeer County Press about the false charges. He also claimed that the charges caused him to lose the 1980 primary election for Sheriff.

During the trial, defendants moved for a directed verdict after plaintiff presented his case. However, defendants did not renew the directed verdict motion after all the evidence was presented. The factual issues presented for the jury's consideration were submitted to them by a Jury Questionnaire. The jury answered all the questions in the affirmative. The jury awarded $750,000 to plaintiff Young and against defendants, $350,000 in compensatory damages and $400,000 in punitive damages. No motion for judgment notwithstanding the verdict was made. Furthermore, no motion was made for a new trial or for remittitur.

On appeal, defendants Langley and Bond claim that the verdict was excessive, that the evidence did not support certain findings of the jury, that the jury verdict form was flawed and that defendants cannot be held liable for the actions of their subordinates.

II.

A. *Excessiveness of Jury Verdict*

Defendants argue that the jury verdict was excessive. We disagree.

In civil cases, our review of excessive verdicts is limited to those errors adequately preserved in the trial court. The excessiveness or inadequacy of verdicts should be submitted to

the trial court by motion for new trial. *See Hahn v. Becker*, 588 F.2d 768, 771 (7th Cir. 1979). The purpose of new trial motions is to give the trial judge the opportunity to initially correct errors made at trial. The trial judge must be given the opportunity to exercise his discretion. Furthermore, the trial judge's ruling on that motion creates a full record on appeal. On appeal, our scope of review is limited to whether the trial court abused its discretion in ruling on that motion. *Petition of H&H Wheel Service*, 219 F.2d 904, 916 (6th Cir. 1955); *Hahn*, 588 F.2d at 771. This court may not review the alleged excessiveness of verdicts absent a timely motion for new trial and the trial court's ruling thereon. *Hahn*, 588 F.2d at 771; *Panger v. Duluth, Winnipeg and Pacific Ry. Co.*, 490 F.2d 1112, 1118 (8th Cir. 1974); *Ryen v. Owens*, 446 F.2d 1333, 1333-34 (1971).

In the present case, the excessiveness of damages issue was raised for the first time on appeal. The trial court never had an opportunity to pass on the claim now presented by defendants. Since defendants did not timely raise the excessiveness of the verdict issue, we hold that it is not now appropriate for review.

B. *Sufficiency of the Evidence*

Defendants claim that the evidence does not support the liability findings of the jury. We believe that since appellants did not preserve this issue for appeal, we need not reach the merits.

The Seventh Amendment of the United States Constitution provides that no fact tried by a jury shall be re-examined by any court except according to the rules of the common law. This circuit recently reiterated this principle in *Moran v. Johns-Manville Sales Corp.*, 691 F.2d 811, 813 (6th Cir. 1982). In *Moran* we stated that "[s]trictly speaking, this court does not review the actions of juries. Our review of the sufficiency of the evidence is by review of a trial judge's rulings on motions for directed verdict or JNOV. . . ." *Id.* Furthermore, where a defendant moves for directed verdict at the close of plaintiff's

testimony and does not renew its motion at the close of the entire testimony, defendant waives its original motion and is precluded from questioning the sufficiency of the evidence on appeal. *American National Bank & Trust Company v. Dean*, 249 F.2d 82, 83 (6th Cir. 1957); *see Warner v. Kewanee Machinery & Conveyor Company*, 411 F.2d 1060 (6th Cir. 1969), *cert. denied*, 398 U.S. 906 (1970); *see also Dunn v. Sears, Roebuck & Co.*, 639 F.2d 1171, 1175 (5th Cir. 1981) (holding that in absence of a motion for directed verdict, sufficiency of evidence is not reviewable on appeal).

The present case was tried to a jury on the facts. Although defendants made a motion for directed verdict at the close of plaintiff's proofs, no motion for directed verdict was made at the close of all the proofs. Not only does this omission preclude our review of this issue, the fact that no motion for JNOV was made by defendants also prevents this Court from ruling on this matter. Since our review is limited by the trial judge's rulings on motions for directed verdict or JNOV and since no directed verdict or JNOV motion was made at the close of the proofs, we hold that the sufficiency of the evidence challenge has not been properly preserved for appeal.

C. *Jury Verdict Form*

Defendants argue that the flawed jury verdict form necessitates a new trial on the issue of punitive damages. We disagree.

Generally, where a party fails to object to an instruction this Court will not consider that objection on appeal. *Wiskotoni v. Michigan National Bank-West*, 716 F.2d 378, 388-89 (6th Cir. 1983). Where an error in jury instructions is obvious and prejudicial, an appellate court may consider the matter in the interests of justice where the complaining party has failed to object to the jury instructions at trial. *Id.* at 382. Although a motion for new trial is not required for appellate review, failure to include an excessive damages issue in a motion for a new trial or otherwise present it to the trial court

precludes our review. *See Haley v. Wyrick*, 740 F.2d 12, 13 (8th Cir. 1984) (holding that an excessiveness of a verdict issue should be a matter for the trial court which has had the benefit of hearing the testimony and observing the demeanor of the witnesses and which knows the community and its standards).

When this case was first tried in 1983, the instructions to the jury, which included the verdict form, were agreed upon by the parties. Defendants did not make a motion objecting to the jury instructions during the intervening years and no objection was made to the jury instructions or verdict form used in the 1985 trial. Moreover, defendants did not make a JNOV motion after the verdict to correct this alleged error. Furthermore, a motion for new trial was not requested until appeal. Since there is no allegation that the jury instruction form was prejudicial and since no excessive damage claim was made in a new trial motion, we hold that defendants did not properly preserve this issue for appeal.

D. ***Liability of Defendants***

Defendants argue for the first time on appeal that the legal theory of respondeat superior has application to this case. Again, we decline to review the merits of an unpreserved claim.

The above argument was not addressed to the trial court in a motion for directed verdict, JNOV or even an objection to the jury instructions. Since this is a question of fact and is related to the sufficiency of the evidence, we hold that defendants did not preserve this issue for review under the same rationale listed in part II B of this opinion.

Accordingly, we affirm the decision of the district court awarding damages to the plaintiff.

Flint, Michigan
Monday, January 21, 1985
Morning Session

(At about 9:12 A.M. — Court in session.)

THE CLERK: All rise. The Court is now in session. You may be seated.

MR. PIDGEON: Your Honor, it is my understanding at this juncture that Plaintiff has rested.

THE COURT: Yes.

MR. PIDGEON: In that event, your Honor, at this time I make a motion for directed verdict, directed verdict, no cause for action. The basic claims asserted against my client, your Honor, is that they falsely charged Mr. Young with certain improper actions undertaken by him. Falsity, your Honor, is a knowing untruth. In this case there has been no proof that either Mr. Langley or Mr. Bond who knew that any of the charges against Mr. Young were false. In fact, your Honor, the evidence clearly demonstrates, going on down the line, that the charge of failing to respond to a dispatched call was a charge brought by Mr. White, Sergeant White, Mr. Young's supervisor.

Secondly, the charge of leaving work early was also a charge asserted by Mr. White's — excuse me, by Mr. Young's supervisor, Sergeant White, neither of which were asserted by my clients, Mr. Bond or Mr. Langley.

With respect to the charge that Mr. Young demeaned his uniform or acted in a manner unbecoming an officer, we know that a thorough investigation was conducted, both by Detective Thick and subsequently by Lieutenant Parks, and that investigation revealed certain things upon which Mr. Langley and Mr. Bond apparently felt the need to act. There is nothing to indicate that either or any of the information was

trumped up by my clients, nor is there anything to indicate that any action that they took pursuant to the charges or the information obtained from the chief of police for the city of Imlay City or the school teacher or Mrs. Gregias and Mr. Young and so on was unsubstantiated, nor that the action they took was out of any false motives.

Finally, as to the jail break, we know that there was numerous reports submitted, and it was only after review of the reports by Sergeant White, by Mr. Bond by Marvin North and by Deputy Young that any action to suspend Mr. Young was undertaken. No information has been supplied to this Jury in this courtroom to indicate that any of the activities undertaken were done for a false reason. The charges are that we acted falsely; false charges were brought and therefore Mr. Young — or excuse me, Mr. Langley and Mr. Bond should be liable. No information whatsoever has been presented to his Court to indicate that falsity of any kind was involved.

Granted, there has been testimony from Mr. Young with regard to motive. I might have a terrible motive in undertaking certain actions. However, my motive notwithstanding, I submit to the Court that if my actions are justified in my own mind, and if they're based on reasonable information, then they cannot be deemed false, no matter what my ill motive might be.

There's not one iota of testimony in this case to indicate that the charges brought against Mr. Young were false, and that's the very sum and substance of his case, and I submit the Court has no choice but to grant me a directed verdict at this — at this juncture upon all claims asserted.

MR. UNDERWOOD: I hear my brother counsel arguing facts in the case. It seems that, and I'm sure that your Honor is not surprised to hear it, I take an opposite view of the facts. I think that ample testimony has been submitted that the Sheriff and Undersheriff, Langley and Bond, used their office to invoke some reprisals on Mr. Young. His candidacy was going.

Their view is it was just coincidental that he was reprimanded, punished, suspended and smeared in the newspaper at the time that he was candidate for office. I think that clearly is a jury question. There is ample evidence. If the Court likes, I can go back and go through the witnesses, but I think your Honor remembers.

THE COURT: I think you should.

MR. UNDERWOOD: All right.

Mr. Young has testified to Mr. Bond's statement to him concerning his candidacy. That factor alone, if believed by the Jury, I believe would warrant their finding, if they find that the investigation or the acts charged against Mr. Young were without any substance whatsoever would support their finding that the Defendants Langley and Bond used their position to smear Mr. Young, smear his candidacy —

THE COURT: Well, you started off by saying that there was some testimony as to what Mr. Langley said to Mr. Young, but you didn't repeat what that testimony was.

MR. UNDERWOOD: That was Mr. Bond, your Honor. That was the testimony of Mr. Young of the automobile ride to get his identification and civilian clothes where —

THE COURT: Okay, I remember that, I remember that testimony now that you've referred to the automobile ride. Okay.

MR. UNDERWOOD: That he would not even be comfortable living in Lapeer County after the election had taken place.

THE COURT: Well, I'm sort of referring to primarily to Mr. Pidgeon's point that he — that there was no way of showing that either Bond or Langley knew that the charges were false, since they did not prefer the charges, but White apparently did.

MR. UNDERWOOD: Well, that —

THE COURT: That there's no evidence — his claim is that there is no evidence that they knew that they were false.

MR. UNDERWOOD: That does not —

THE COURT: I think his point is, also, that they may have been delighted to be able to have charged Mr. Young, but that unless they knew it was false, that there could be no cause of action; at least, that's Mr. Pidgeon's position.

MR. UNDERWOOD: All right. As to the first incident, the failure to respond, we have Defendant Langley out on the road monitoring the same radio traffic that's already before the Jury. Sergeant White prepares a report which is not a charge at all, and that report is in evidence. There is nothing in there that is critical of Deputy Young. The charge eminated from the Defendants.

Secondly, the school incident, the evidence is that Deputy Thick concluded and testified that he reported that it was merely a domestic relations squabble. The further evidence is that my client complied with every regulation and every ordinance for which he was responsible, and that the charges eminated solely from the office of Sheriff and Undersheriff, contrary to the — even what they said he did wrong.

Thirdly, the jail escape, the testimony clearly shows that Undersheriff Bond was out and perhaps it wasn't his primary responsibility to guard prisoners, but there's enough evidence before the Jury to conclude that Undersheriff Bond was watching the prisoners and knew that Mr. Young had gone, and that the decision to suspend him was known to be false, especially a review of the reports of Mr. North and Mr. Langley — or excuse me, Sergeant White as well as Deputy Young. Any reading of those clearly shows that it was not Deputy Young's responsibility, and that therefore the charge of suspending him was trumped up, and therefore false.

THE COURT: Anything else?

MR. UNDERWOOD: So — well, I'm concluding by saying that I believe there's ample evidence before the Jury to conclude that not only were the charges false, they were done to visit reprisals on Deputy Young, who had announced for candidate for that very office.

Even all of that aside, I suppose the other thing that shows that they knew that they were false is the solicitation of the letters from the prisoners. They have no other motive but to make sure that Mr. Young's name was diminished or smeared by solicitation of letters from the prisoners, and that clearly is in evidence so far.

MR. PIDGEON: A brief response, your Honor. The suggestion has been made that the charges as opposed to the report or complaint made by Sergeant White were known to be false.

On the issue of the failure to respond, there's no evidence here that any formal charge was ever brought, other than the report filed by Sergeant White on the failure to respond.

With respect to the action — excuse me, with respect to the leaving work early, again that is simply a report filed by Mr. White, and there's no evidence that any action was taken upon it.

But finally, despite all the argument made by counsel relative to motive of the Defendants, however ill their motive may have been, and I must concede there is some evidence presented, at least through the testimony of Mr. Young relative to the motivation for the actions or lack of actions undertaken, there's nothing in this record that indicates that once the motivation was there and once certain facts were before the Defendants, that they acted knowing that the charges or whatever actions they took were false. Since there's nothing to indicate falsity, the claims here can't stand, and that's the sum and substance of it.

THE COURT: Okay. The motion is denied.

Would you bring the Jury back, please. (At about 9:26 A.M. — Jury entered the courtroom.)

THE COURT: Good morning.

ALL JURORS: Good morning.

THE COURT: You may proceed.

MR. PIDGEON: Your Honor, at this time I would like

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHN B. YOUNG,
Plaintiff,

v

CARL E. LANGLEY and
WILBUR E. BOND, Jointly
and Severally,
Defendant.

CIVIL ACTION
NO: 80-40407

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Stewart A. Newblatt, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It Is Ordered and Adjudged that the plaintiff, John B. Young, recover of the defendants, Carl E. Langley and Wilbur E. Bond the sum of $750,000.00. Compensatory damages determined at $350,000.00 and Punitive damages

determined at $400,000.00 for a total judgment of $750,000.00 plus post judgment interest thereon at the rate of 9.09%.

ROBERT A. MOSSING, CLERK

BY: /s/ RUTH A. JOZWIAK

Ruth A. Jozwiak, Deputy Clerk

Dated: January 29, 1985

(2)

No. 86-467

Supreme Court, U.S.
FILED
OCT 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1986

CARL E. LANGLEY, WILBUR E. BOND,
Petitioners,

vs.

JOHN B. YOUNG,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Otis M. Underwood, Jr. (P21678)
Counsel for Respondent
95 S. Washington Street
Oxford, MI 48051
(313) 628-3800

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

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QUESTION FOR REVIEW

IS THERE A "DE NOVO" APPELLATE REVIEW OF A § 1983 CIVIL RIGHTS JURY VERDICT?

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STATEMENT OF THE CASE

The Court of Appeals for the Sixth Circuit held that the Judgment of the District Court awarding damages to plaintiff-respondent was affirmed because the defendants-petitioners did not preserve for appeal the issues of excessive verdict, findings of the jury unsupported by evidence, a flawed jury verdict form, and respondeat superior liability.

———o———

OPINIONS BELOW

Plaintiff-respondent, John B. Young, adopts the defendants-petitioners' recitation of Opinions Below.

———o———

JURISDICTION

Plaintiff-respondent, John B. Young, adopts the defendants-petitioners' Statement of Jurisdiction.

———o———

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Plaintiff-respondent, John B. Young, adopts the citation of Constitutional and Statutory Provisions Involved.

———o———

SUMMARY OF PLAINTIFF-RESPONDENT'S ARGUMENT

Appellate review of Jury verdicts and claimed evidentiary defects is available only after the trial Judge has exercised his discretion in ruling on Motions for Directed Verdict, New Trial or Remittitur, or JNOV. No exception to this rule obtains in defamation cases involving First Amendment rights. In any event, this case was put to the jury by agreement of all parties as founded upon § 1983 of the Civil Rights Act of 1982. The failure of defendants-petitioners to pursue post trial motions in the Trial Court prevents appellate review of arguments as to evidentiary sufficiency for the verdict, or, the claim that "actual malice" must be proved in a § 1983 Civil Rights case.

———o———

STATEMENT OF FACTS

Defendants-petitioners' statement of the case omits nearly all of the facts most detrimental to the defendants-petitioners. Several citations to the trial transcript are to unrelated issues or witnesses other than those persons identified. Since the essence of the defendants-petitioners' Petition is that the jury unwisely found the facts to be in plaintiff-respondent's favor, according to the agreed upon jury instructions, plaintiff-respondent restates the facts of the case without argument.

In December, 1980, John Young filed his three-count complaint against Carl Langley and Wilbur Bond. Count I alleged a violation of his civil rights under Title 42, § 1983 and § 1985. Count II claimed damages on the

pendant claim of outrage and intentional infliction of emotional distress. Count III claimed damages on the pendant theory of libel and/or slander.

The case was brought to trial in June, 1983. At the close of plaintiff-respondent's proofs, the defendants-petitioners moved for a directed verdict. The court granted defendants-petitioners' motion as to Counts II and III, and consolidated all of plaintiff-respondent's claims under a § 1983 theory. The defendants-petitioners proceeded to support their case with evidence. No further motion was made at the close of the proofs. The case was submitted to the jury with agreed-upon instructions. After several days of deliberation, the jury was unable to arrive at a verdict and the court declared a mistrial.

The case was called again for trial in January, 1985. John Young testified that he had been a deputy for 12 years. (T45, Vol.I) In early 1980, he began circulating nominating petitions for the office of sheriff. (T.50, Vol.I) Within a few weeks, Wilbur Bond, then Undersheriff, commented to Young that he was aware of a John Young circulating petitions. When Young confirmed this, Bond said "That's very interesting." (T.51, Vol.I)

Young further testified that in late April, while on duty, he received a radio call to go to a home about seven and one-half miles away, where a man had fallen from a roof. (T.55, Vol.I)

En route, his patrol car was nearly collided with by a motorist going through a stop sign. Young radioed the dispatcher, and his shift commander, Sgt. Art White, whose car was nearby, that he had a traffic stop and was

advised that Sgt. White would take over the call to the injury scene. (T.58, Vol.I) Young heard radio traffic that the ambulance had loaded the injured person and had departed the scene. After issuing a citation, Young went to the injury scene and, later, back to the jail complex. (T.61, 62, Vol.I)

That same day, Young left the jail complex at about 3:00 p.m., an hour earlier than the end of his shift. (T.65, Vol.I) It was the first occasion he had to leave work early. (T.64, Vol.I) He had telephoned Lt. Arnold, Commander of all road patrol officers, the previous evening and was given permission to leave early and instructed to inform his shift commander, Art White. (T.64, Vol.I) He informed Sgt. White that morning that he was leaving an hour early. (T.65, Vol.I) As he left Young saw Sgt. White and said "I'll see you later." To which White replied "Okay, have a good weekend." (T.66, Vol.I)

Young's ex-wife, a teacher at their daughter's school, had plans to re-marry that same weekend. (T.68-70, Vol.I) Young had visitation with his children that weekend and was unaware of his former wife's plans. (T.71, Vol.I) When calling her about his visitation, he learned that she was already living with a man, as reported to him by his children. (T.71, Vol.I) He took off work early to pick up his children to be interviewed by his attorney, Mr. Priesel. (T.73, Vol.I)

Upon arriving at his daughter's school, Young went to the principal's office. The secretary there directed him to his daughter's room. (T.6, Vol.III) The principal was making announcements over the public address system.

Upon arriving at the classroom, he identified himself as "Peggy Young's father, and I've come to pick her up." The teacher walked away, and Young left with his daughter. (T.8-9, Vol.II)

Four or five days later, Young was told of a meeting in Carl Langley's office, who was then Sheriff. (T.16, Vol. II) Langley told Young he had violated a city ordinance by taking his daughter out of school. And, that Wilbur Bond had written him up for failing to respond to an emergency. When Young tried to explain, Langley told him "I could bust you in the mouth . . . you're causing me a lot of problems." (T.17, 18, 21, Vol.II)

Langley took Young's police I.D. card, his service revolver, directed him not to wear his uniform in public, took him off road patrol and assigned him to work as a turnkey in the jail. He was sent directly home to get civilian clothes in the company of Wilbur Bond. (T.22, Vol.II)

En route to Young's home, Bond spoke of Young's candidacy for sheriff and Bond's drinking problems. (T.26, Vol. II) On the return to the jail complex, Bond told Young "You're going to be real sorry you took Carl and I on." After we win "you will not like being at the Lapeer County Sheriff's Department, and you won't even want to be living in Lapeer County when we're done with you." (T.27, Vol.II)

Young pursued union grievances, but to no avail. In the meanwhile he worked his assignment of turnkey. (T.28, Vol.I) About two months later, a prisoner escaped from the exercise yard. (T.31, Vol.II) Young was taking prisoners from their cells to the exercise yard while Marvin

North, a probationary new hire, was ordered by Sgt. Art White to stand armed guard on the outside of the fenced yard. (T.34, Vol.II) Sgt. White then radioed for Young to come to the front to process a prisoner being released. (T.39, Vol.II)

Just before that, Wilber Bond had walked up to Marvin North and begun talking with him. The two then walked away from the exercise yard to the garage area. (T.59-61, Vol.VI) One of the prisoners climbed over the fence. (T. 114, Vol.III) The prisoner was apprehended within an hour and a half. The locker-room discussion at the Sheriff's Department, after the prisoner was secured was "who was guarding?" Wilber Bond responded to this by chuckling "I guess I was." (T.81, Vol.II)

Young was directed to write two reports concerning the escape. The next time Young heard of the incident was a telephone call from Nancy Hale (Brown), a reporter for the Lapeer County Press two weeks later. She called Young for his reaction to being suspended as his punishment for allowing the escape. (T.48, Vol.II) She testified to hearing this in Carl Langley's office with Deputy Marvin North also being present. (T.45. Vol.II)

Wilber Bond then sent for Young and told him he was suspended for five days without pay for being responsible for the escape. (T.50, Vol.II) Two days later, the Lapeer County Press headline carried Young's suspension to the public along with the comment that "Sheriff Carl Langley charges him with failure to respond to an emergency, leaving work without permission and behavior unbecoming an officer. He has ordered Young not to carry his gun while off duty and transferred him from road patrol to

jail duty." (T.52, Vol.II); Exhibit 1—21,000 copies of the paper were printed.

Young was called a "political prisoner" by his fellow deputies and heard people in the community talking about him from coffee shops to his daughter's classmates. (T.53, Vol.II) After losing in the August primary, he was finally returned to road patrol duty at the end of September, 1980. (T.56, Vol.II)

Nancy Hale (Brown), the reporter, couldn't remember from whom she first learned of the suspension. (T.89, 91, Vol.II), but did remember Carl Langley telling her of Young's charges of failure to respond to an emergency, behavior unbecoming an officer and leaving work without permission. (T.92, Vol.II) She also remembered receiving letters from prisoners in the jail blaming the jail escape on John Young. (T.95, Vol.II)

Gregory Eberhard, one of those prisoners, testified that Carl Langley, on two or three occasions asked him and other prisoners to write letters to the Press blaming Young for the escape. (T.89-90, Vol.III) This was further corroborated by John Raymond, another prisoner, who said the same thing, (T.119, 120, Vol.III) and corroborated further still by Deputy North, in whose presence Langley solicited the letters. (T.37-39. 50, Vol.III)

Plaintiff-respondent's case was further buttressed by Det. Lt. Fahling of the Michigan State Police, an expert on police radio traffic. He listened to the copy of the dispatcher's tape sending John Young to the scene of the fall and the taking over of that dispatch by his shift commander, Art. White. Det. Lt. Fahling's opinion was that Young

was justified by what he heard on the tape in continuing with the stop of the motorist that had almost struck his patrol car. (T.32, Vol. IV)

Young's union steward, Det. Philip Thick, testified that the official reports made by himself and others in the department called for no disciplinary action against Young for the incidents claimed: leaving work early, conduct unbecoming an officer, and failing to respond to an emergency call, (T.98, Vol.IV), and clipped the newspaper announcement of Young's candidacy to include in his union file pertaining to the grievances Young made to Langley's discipline of him. (T.114, 115, Vol.IV)

At the close of plaintiff-respondent's case, the defendants-petitioners moved for a directed verdict on the ground that evidence was insufficient that charges against Young were false, and that for two of them, Sgt. Art White had been the initiator. (T.3-8, Vol.V) The court denied the motion. (T.9, Vol.V)

The defendants-petitioners called Sgt. Art White, who tried to explain why he did not go to the scene of the accident after telling Young "Ok, I'll slip out that way." (T. 86-87, Vol.V) and further, that although he (White) had told Young he could leave early, his understanding from Lt. Arnold was that permission had not been already given but depended upon his (Sgt. White) giving the okay. Because of his (White's) belief that Young had not talked to Lt. Arnold at all about leaving an hour early, a written report was made. (T.89-90, Vol.V) Sgt. White also said that Deputy North had been ordered by him to stand armed guard over the exercising prisoners and that he had not been given his permission to leave that post. On the other

hand, Young had been called by him over the walkie-talkie to come and process out a prisoner being released. (T.94, Vol.V)

Wilbur Bond was called next. First to explain his non-attendance at the trial (T.101-102, Vol. V), due to part time security officer work at a grocery store (T.17, Vol. VI), and then to state that he had only talked to Young about his candidacy for sheriff on two occasions (T.106-107, Vol. VI), and that when he got Sgt. White's report of Young leaving work early, he talked with Lt. Arnold and " . . . let the thing go . . . I dropped it." (T.108, Vol. V), " . . . it did become confusing as to who said what to who and who did or did not give him permission to go off duty early." (T.31, Vol.V)

Bond further explained his actions on the conduct-unbecoming-an-officer charge. After reviewing both Det. Thick's report and the follow-up report of Det. Lt. Parks, he went to see the sheriff (Langley). "We determined . . . he had broken a law . . . he couldn't be inside the school without the permission of the principal and that he had never obtained . . . (it)," (T.110, Vol.V) due to the principal talking on the public address system at the time. (T.42-44, Vol.VI) When pressed, Bond charged that Young had taken his daughter before school was out and against teacher objection, even though neither investigative report mentions teacher opposition and Bond himself had no contact with the teacher. (T.45, Vol.VI)

On the failure to respond to an emergency charge, Bond, after listening to the dispatcher's tape recording of the radio traffic (T.113, Vol.V) wrote that ". . . there seemed to be some confusion as to who was to complete the

assignment . . .'' (T.18, Vol.VI), but nevertheless cited Young with a violation of department orders, Exhibit II. He was given a written reprimand. (T.19-21, Vol.VI)

Bond's version of Young's leaving work early charge was that Sgt. White '' . . . advised that he had not given the officer permission . . .'', Exhibit 5 (T.29, Vol.VI), and denied having ever seen Sgt. White's report, Exhibit F, saying that permission had been given. (T.30, Vol.VI)

Bond concluded that Young was not disciplined for these items (T.48, Vol.VI), but, rather, his off-duty I.D. and uniform was taken along with his assignment as a turnkey '' . . . for the Department's better management . . .'' (T.49, Vol.VI) Bond then changed his testimony to say that Young was given a five-day suspension for the school incident. (T.49-50, Vol.VI)

Mr. Langley next testified that Young was reprimanded for failing to take a call (T.81, Vol.VI), at Bond's recommendation (T.82, Vol.VI), and, also, that the placement of Young in the jail as a turnkey was initiated by Bond. (T.103, Vol.VI)

Langley was forced to recant his denial of previous political discipline and admit that when another deputy charged him with wrongdoing, he told the newspapers that the motive was purely political. (T.15, Vol.VII) But, generally, Langley denied any political motive in his disciplining of Young. (T.20, Vol.VII)

Det. Lt. Gary Parks, Internal Affairs Officer, testified in rebuttal. First, to contradict Langley's denial that Bond had been directed to go to an alcohol abuse center (T.125, Vol.VI) and then, as to having Mr. Bond brought

in to him while intoxicated and driving a Sheriff's Department car. (T.12,13, Vol.VII)

Lt. Parks said that he had personally taken the inebriated Mr. Bond in to Mr. Langley (T.24,25, Vol.VIII) and that Langley had told him Bond and his wife were going for counseling. (T.26, Vol.VII) Lt. Parks further contradicted Langley's denial that when questioned by the Lapeer County Press about another deputy's actions, he had suspended the deputy to avoid embarrassment. (T. 12, Vol.VII) Lt. Parks testified that Langley took the deputy to a bar for the day to smooth over the suspension " . . . he was talked into . . . and that if we tried to clarify it . . . the whole department (would) look even worse . . ." (T.28, Vol.VII) Lt. Parks concluded that Mr. Langley is " . . . not necessarily truthful." (T.42, Vol.VII)

When the case was in, no further motions were made, and the motion for directed verdict made at the close of plaintiff-respondent's case was not renewed. (T.62, Vol. VII) The court instructed the jury and no objection to the instructions was raised by either side. (T.184, Vol. VII) The jury returned their verdict on the stipulated form in favor of the plaintiff-respondent in the amount of $350,000.00 compensatory damages and $400,000.00 punitive damages, jointly and severally. The defense polled the jury. Judgment was entered on January 29, 1985, pursuant to Rule 58.

No further motion was made under Rule 50, Rule 59, or Rule 62.

Langley and Bond filed their Notice to Appeal on February 28, 1985, to the Sixth Circuit Court of Appeals. The Court of Appeals affirmed the Judgment.

ARGUMENT

No Writ of Certiorari should be issued since the Sixth Circuit Court of Appeals followed well settled precedent in declining to review issues of fact decided by the jury when the defendants-petitioners never asked the trial judge to address the arguments urged on appeal. Secondly, there is no conflict among the circuits on this point, but, rather, agreement as well as being in harmony with FRCP 50,51 and 59. Third, there was evidence from which a jury could find, directly and inferentially, that the defendants-petitioners "knew" the falsity of the charges made against plaintiff-respondent.

The defendants-petitioners did not preserve for appellate review the factual issues with which they disagreed on the Jury Verdict and Findings.

Wright & Miller, § 2534 discuss FRCP 50:

> Technically a party waives his right to a directed verdict, if the motion is made at the close of his opponent's case, and thereafter he introduces evidence in his own behalf. However, he may renew the motion at the close of all the evidence. If the party fails to renew the motion he may not move for judgment notwithstanding the verdict nor may he claim error on appeal from denial of the motion at the close of the opponent's evidence. (Citing *Demeen v. Baltimore & O.R. Co.,* D.C.W.Va. 1946, 68 F. Supp. 148; *Gillentine v. McKeand,* C.A.1st, 1970, 426 F.2d 717, 722-723; *Budge Mfg. Co. v. U.S.,* C.A.3d, 1960, 280 F.2d 414; *American Nat. Bank & Trust Co. v. Dean,* C.A.6th, 1957, 249 F.2d 82; *Home Ins. Co. of New York v. Davila,* C.A.1st, 1954, 212 F.2d 731; *Auto Transp., Inc. v. Potter,* C.A.8th, 1952, 197 F.2d 907; *Meier & Pohlmann Furniture Co. v. Troeger,* C.A. 8th, 1952, 195 F.2d 193; *Capital Transp. Co. v. Compton,* C.A. 8th,

1951, 187 F.2d 844; *Hart v. Grim, Empire State Ins. Co., Intervenor,* C.A. 8th, 1950, 179 F.2d 334; *Minnehaha County, South Dakota v. Kelley,* C.C.A. 8th, 1945, 150 F.2d 356; *R & R Associates, Inc. v. Visual Scene, Inc.* C.A. 1st, 1984, 726 F.2d 36, 38; *Special Promotions, Inc. v. Southwest Photos, Ltd.*, C.A. 5th, 1977, 559 F.2d 430, 432, citing Wright & Miller; *Pierce v. Lopez,* 1971, 490 P.2d 1182, 1184, 16 Ariz.App. 54, citing Barron & Holtzoff.)

No other Circuit Court has ruled to the contrary, and, therefore, there is no conflict among the circuits on this procedural point.

Morgan Electric Co. v. Neil, 198 F.2d 119 (CA9, 1952) has no application to this case. *Morgan* did not permit appellate review of claimed factual deficiencies when no post verdict or post trial motions are made. What *Morgan* did permit was a review of an Order on a Motion as to what affirmative defenses could be plead and argued in a breach of employment contract case.

> "[1] We agree with appellant that the effect of these rulings was to place on appellant the burden of proving not only that appellee had failed to follow appellant's instructions, but of further proving that Neill had 'expressly agreed' to follow these instructions as part of his contract of employment. The theory behind such a ruling is unrealistic and without substance in law. It overlooks the universally recognized law of implied promises. It is aptly summarized in 24 L.R.A.,N.S., 814:
>
> > 'The duty of a servant to comply with all lawful and reasonable orders given by his master with respect to the performance of such functions as fall within the scope of employment is one of those fundamental obligations which are deemed

> to be impliedly undertaken as an incident of every contract of hiring.'
>
> If it be true, as the stricken matter alleges, that Neill failed to follow instructions as therein particularly specified, then the rulings of the trial court in granting appellee's motions to strike imposed upon appellant an added burden of proof which the law does not impose."

The citation of *Morgan Electric Co. v. Neil,* supra, is inapposite for defendants-petitioners' conclusion that this Court should grant its Writ to now review issues of fact never brought before the trial judge after the case was completed or after the verdict of the jury.

Likewise, defendants-petitioners' citation of *Franki Foundation v. Alger-Rau & Assoc., Inc.,* 513 F.2d 581, 585, 586 (CA3, 1975) is misplaced. In *Franki,* the court vacated the judgment entered on the jury verdict because the jury verdict failed to answer Questions 3 and 4 as charged by the Court. The decision to vacate the judgment was reasoned as follows:

> For the trial judge to have entered judgment on the verdict, he apparently first either (a) supplied his own answer to Question 3, or (b) assumed that the jurors answered Question 3 in the negative, due to either its omissions or the belief that the need to answer this question had been eliminated by the jury's answer to Question 1. *Iacurci* indicates that either course would have been improper, 387 U.S. at 87, 88, 87 S.Ct. 1423, 18 L.Ed.2d 581. See also *Union Pacific Railroad Co. v. Bridal Veil Lumber Co.,* 219 F.2d 825, 831-32 (9th Cir. 1955), cert. denied, 350 U.S. 981, 76 S.Ct. 466, 100 L.Ed. 849 (1956)."

Having decided that the incomplete jury verdict required a new trial, the procedural problem was addressed

of motions for new trial and JNOV having been timely filed, but not briefed or argued due to counsel's absence from the case:

> "In the case now before this court, appellant's post-trial motions served this purpose by detailing objections to the court's judgment, including the failure of the jury to answer Question 3, notwithstanding the fact that appellant failed to completely prosecute the motions. Thus, this *issue of the failure to answer Question 3 is not raised for the first time on appeal.* The trial judge was aware of these objections at the time he denied appellant's motions, and he could have ruled otherwise. While a court is not obliged to examine grounds for post-trial motions which are advanced in detail therein, but neither briefed nor argued, courts have at times done so. See, e.g., *Solar Fuel Co. v. United Mine Wkrs. of Amer.*, 346 F.Supp. 789, 798 (W.D.Pa. 1972), aff'd 481 F.2d 1399 (3d Cir. 1973, cert. denied, 416 U.S. 909, 94 S.Ct. 1617, 40 L.Ed. 2d 114 (1974). Cf. *Clay v. Southern Railway Co.*, 284 F.2d 152, 154 (5th Cir. 1960)." (emphasis added)

In the case at bar, the verdict was fully delivered squarely against Langley-Bond. Unlike the defendants-petitioners in *Franki Foundation Co. v. Alger-Rau & Assoc., Inc.*, supra, no motion for a new trial or JNOV was filed. This citation does not support the conclusion that asking the trial judge to rule on alleged fact deficiencies is an "unnecessary task" for review on appeal. The right to appeal should not be confused with the scope of the issues properly reviewable on appeal. Otherwise, in every case where there is a claimed error or deficiency in the pleadings, discovery, admission of exhibits or testimony, the argument could be urged for the first time in Appellate Court briefs or in a Petition for Certiorari.

Langley-Bond seeks to justify all of their failures to address the trial court with the fact issues raised at the Sixth Circuit Court of Appeals, by concluding that they are entitled to a "De Novo" review of the entire case in this Honorable Court. As further addressed below, this, too, is addressed for the first time in this Court. Not only is there no decision of the Sixth Circuit to review, no court has ever held that § 1983 Civil Rights cases are entitled to a "De Novo" review on appeal, thus eliminating the "unnecessary task" of filing motions for Directed Verdict, New Trial or JNOV in the trial court.

The Citation of footnote 2, from the decision in *Sherill v. Royal Industries, Inc.*, 526 F.2d 507 (8th Cir.1975), by Langley-Bond is equally non-supportive of the "Conflict of the Circuits" claim. It is a curious inclusion, however, in their Petition for Certiorari to this court, since Langlay-Bond agreed to the jury instructions given in the case at bar. The text of the Opinion in *Sherill* under which footnote 2 was included flatly states:

> "All of the issues raised by appellant Sherill on this appeal relate to the instructions given to the jury by the district court.[2]"

It can readily be deduced that defendants-petitioners' reliance upon *Sherill* is misplaced.

Equally curious is defendants-petitioners' citation of *Colletti v. Credit Bureau Services, Inc.*, 644 F.2d 1148 (5th Cir.1981). *Colletti* is in harmony with and supports the holding of the Sixth Circuit in this case. In no way is *Colletti,* supra, an example of the defendants-petitioners' claim of the "conflict of the circuits." Even defendants-petitioners' quotation from Colletti is a paraphrase of Judge Keith's opinion in *Young v. Langley.*

The Opinion of the Sixth Circuit Court of Appeals discloses that Langley-Bond raised for the first time on Appeal the issues of a claimed excessive verdict, insufficient evidence, a flawed jury verdict form agreed to in the trial court, and a legal theory of respondeat superior. Since none of these arguments had been presented to the district judge who had presided over two trials, the Court of Appeals followed well settled precedent in holding that these factual issues had not been preserved for appellate review.

The thrust of defendants-petitioners' argument to this Court is to plead for a major alteration in the procedures of appellate review in this country by requiring the Circuit Courts of Appeal to wade through the transcripts and record of every § 1983 Civil Rights case tried to a District Court jury without the benefit of the trial judge's opinion.

> " . . . a De Novo review is necessary in cases of this nature, and to require the filing a (sic) post trial motions in such a case would be an unnecessary task." Petitioners Brief, page 9.

As though this proposal is not startling enough, a completely novel legal theory is asserted by defendants-petitioners, again, for the very first time in this Court. That new theory is that plaintiff-respondent's § 1983 Civil Rights case must prove "actual malice" as a necessary element.

Neither the district judge nor the Sixth Circuit Court of Appeals has ever addressed defendants-petitioners' claim that no evidence of "actual malice" was before the jury.

The district court was not asked to rule on whether plaintiff-respondent must prove "actual malice" because the plaintiff-respondent's defamation theory was eliminated during the first trial in 1983. If Langley-Bond seriously believed that "actual malice" was a required element of proof of plaintiff-respondent's claim, would not the efficient administration of justice require that defendants-petitioners urge the trial court to charge the jury on that legal theory? Or, at a minimum, that objections to the jury instructions be made on the record, per FRCP 51.

Instead, Langley-Bond agreed that the jury instructions were proper. After a thorough review of the record, the Sixth Circuit's decision noted:

> "When this case was first tried in 1983, the instructions to the jury, which included the verdict form, were agreed upon by the parties. Defendants did not make a motion objecting to the jury instructions during the intervening years and no objection was made to the jury instructions or verdict form used in the 1985 trial."

Langley-Bond now urge this "actual malice" requirement in § 1983 Civil Rights cases, citing *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 80 L.Ed.2d 502, 104 S.Ct. 1949 (1984). *Bose* has no application to a § 1983 Civil Rights case. Even if it did, however, there was evidence of "actual malice," even though this issue has not been reached by either the trial court or the Sixth Circuit Court of Appeals.

Initially, *Bose* does not "obviate the necessity of post trial motions." The *Bose* decision does not even make mention of post trial motions, much less carve out a broad

exception to preserving evidentiary issues for appellate review as proposed by defendant-petitioner. Rather, the holding of *Bose* is that the decision of the First Circuit Court of Appeals reversing the trial court's Judgment for plaintiff-respondent was upheld as not limited by the clearly erroneous standard of FRCP 52. In *Bose,* however, the Trial Court, as well as the Circuit Court, confronted the issues of "actual malice" in the use of the word "about" to describe the defendant-authors' perception of sound from the BOSE 901 speaker system.

Mr. Justice Stevens, writing for the Court, said:

> "Here, however, adoption of the language chosen was 'one of a number of possible rational interpretations' of an event 'that bristled with ambiguities and descriptive challenges for the writer. (sic) *Time, Inc. v. Pape,* supra, 401 US, at 290, 28 L Ed 2d 45, 91 S Ct 633. The choice of such language, though reflecting a misconception, does not place the speech beyond the outer limits of the First Amendment's broad protective umbrella. Under the District Court's analysis, any individual using a malapropism might be liable, simply because an intelligent speaker would have to know that the term was inaccurate in context, even though he did not realize his folly at the time . . . we agree with the Court of Appeals that the difference between hearing violin sounds move around the room and hearing them wander back and forth fits easily within the breathing space that gives life to the First Amendment."

Langley-Bond used no malapropisms in describing Young to the Lapeer Press reporter. The charges of failure to respond to an emergency, leaving work without permission, and behavior unbecoming an officer, as well as pinning the responsibility for the escape of a prisoner

emanated from Langley-Bond. It was these charges that were without foundation. These charges were then planted in the newspaper, both directly by Langley and by the guise of "leaks," through letters solicited by Langley from prisoners. The obvious effect of these "charges" was to cast Young, the would-be challenger, as a disinterested, insubordinate, and incompetent police officer. Additionally, when coupled with a report that the Sheriff had "ordered Young not to carry his gun while off-duty and transferred him from road patrol to jail duty" would leave any reader with the impression that Young had been confronted with the charges and found guilty. It was Young's voice as a candidate that was seeking "breathing space," to put his case against the Langley-Bond wrongdoings to the electorate.

Defendants-petitioners' analysis fails to take note that the gravamen of Young's case was not that the Langley-Bond "*statements* they allegedly made, when made, were false" but that it was their *actions* in visiting reprisals through false charges as Young's employment superiors. This *was* plaintiff-respondent's theory put to the jury. The jury questionnaire logically required the jury to find facts in favor of Young on each fact or set of facts. The jury found the facts in favor of Young. No motion challenging the sufficiency of the facts was made.

To escape the well settled law requiring trial court rulings to preserve factual sufficiency arguments for appellate review, *Bose* is urged to be expanded to give defendant-petitioners a "De Novo" review. Their failure to file post trial motions would be thereby excused. *Bose*, however, has never been construed to give defendants-

petitioners a second trial on the facts in the Supreme Court, even in defamation cases. Rather, it was the inherent balancing of the "good unto itself" of the freedom to speak and the "social interest in order and morality" and the limits of the application of general pronouncements that require the retention of appellate review of "constitutional facts." Mr Justice Stevens writing for the Court:

> "In each of these areas, the limits of the unprotected category, as well as the unprotected character of particular communications, have been determined by the judicial evaluation of special facts that have been deemed to have constitutional significance. In such cases, the Court has regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited. Providing triers of fact with a general description of the type of communication whose content is unworthy of protection has not, in and of itself, served sufficiently to narrow the category, nor served to eliminate the danger that decisions by triers of fact may inhibit the expression of protected ideas. The principle of viewpoint neutrality that underlies the First Amendment itself, see *Police Department of Chicago v. Mosley,* 408 US 92, 95-96, 33 L Ed 2d 212, 92 S Ct 2286 (1972), also imposes a special responsibility on judges whenever it is claimed that a particular communication is unprotected. See generally, *Terminiello v. Chicago,* 337 US 1, 4, 93 L Ed 1131, 69 S Ct 894 (1949).

The *actions* of retribution by Langley-Bond for the exercise of Young's First Amendment rights were found actionable under § 1983 of the Civil Rights Act of 1982. Even though part of Young's damages was the reporting of

these retributions to the press, no issue of requiring Young to prove that retribution was performed with "actual malice" was asserted in the trial court or addressed by the Sixth Circuit.

Even though it is difficult to imagine how "retribution" could be accomplished without "actual malice," the defendants-petitioners here make no effort to confront the evidence put to the jury and demonstrate that their *actions* deserve constitutional protection. Rather, the conclusion is asserted that no evidence of "actual malice" was proved, and thus leaves it to this Honorable Court to plough through the record.

The Petition for Certiorari should be denied.

CONCLUSION

For the above reasons, the plaintiff-respondent, John B. Young, requests that this Court deny the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

Otis M. Underwood, Jr. (P21678)
Counsel for Respondent
95 S. Washington Street
Oxford, MI 48051
(313) 628-3800